No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury, strengthen the civil-justice system, and protect access to the courts. AAJ is the world's largest trial bar association, with members in the United States, Canada, and abroad. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury.

This case is of acute interest to AAJ, because the redefinition of the basic term "defendant," as Petitioner proposes, rejects this Court's careful jurisprudence and invites a host of unintended consequences, including unwarranted expansion of federal court jurisdiction over state-law causes of action, diminution of state courts' important role in developing and defining state law, and undermining the historic right of plaintiffs to proceed in the forum of their choice.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Assuming *arguendo* that Petitioner Home Depot U.S.A., Inc. ("Home Depot") is correct in its analysis and it should be construed to be a "defendant" under the removal statutes, Home Depot would still not be able to remove this case to federal court. First, Home Depot, even as a "defendant," would not be entitled to remove this action under the law as it existed before the enactment of the Class Action Fairness Act Of 2005 ("CAFA"), because it would not be able to get the agreement of all "defendants" to that removal. Secondly, the CAFA amendments do not provide Home Depot the right to remove, because Home Depot cannot survive the "local controversy" exception to CAFA federal court jurisdiction. As a result, it will ultimately be proven that this Court does not have jurisdiction to hear this case and any opinion will accordingly be merely advisory.

While Petitioner and its amici make various claims about the public policy behind the enactment of CAFA, none of them makes even a passing attempt to relate those policy considerations to the actual facts of the case before this Court. In fact, all public policy arguments weigh in favor of this case proceeding in North Carolina state court, as the facts of this case make it the prototypical type of class action Congress expressly intended should remain in state court. Nor, as is argued by the Brief of the Retail Litigation Center, Inc. and the Chamber of Commerce of the United States of

America ("Chamber"), did Congress feel that the absence of CAFA might affect MDL jurisdiction; indeed, in the body of CAFA, Congress actually included a limitation upon the jurisdiction of MDLs. Further, the Brief of Defense Research Institute ("DRI") is categorically wrong when without any evidence it argues that state court judges are biased due to their elections being dominated by contributions from the plaintiff bar when the reality is, if anything, the opposite. The bottom line is that state courts are absolutely necessary courts of general jurisdiction in the federal scheme and the denigration of those courts by Home Depot and its amici is unwarranted.

The text and history of 28 U.S.C. §§ 1441 and 1453 make it clear that Congress never meant to confer upon "third-party counterclaim defendants" the removal rights it granted to "defendants" that were sued by the plaintiff. This Court's long-established tradition to strictly construe removal under § 1441 should not be changed, and it was not changed by CAFA and § 1453 in order to extend removal rights to third-party counterclaim defendants. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) has been correctly viewed as limiting removal rights to only defendants sued by the plaintiff and there is no reason to change that interpretation now.

Home Depot's concerns over a great loophole opening the floodgates to federal jurisdiction are grossly overblown, as there have been relatively few

third-party counterclaim class actions in the thirteen years since CAFA became law. However, if this Court concludes that third-party counterclaim defendants may be construed to be "defendants" under the removal statutes and afforded the same rights to remove proper state court actions as defendants sued by the plaintiff(s), instead of limiting gamesmanship, it will likely usher in a new era of a vastly enlarged federal court civil docket. History shows that certain defendants have abused textual loopholes to gain federal jurisdiction when preferred, and nothing in contemporary jurisprudence indicates they won't do it again.

ARGUMENT

I. ASSUMING *ARGUENDO* THAT HOME DEPOT IS CORRECT IN ITS ANALYSIS, HOME DEPOT WOULD STILL NOT BE ABLE TO REMOVE THIS CASE TO FEDERAL COURT; AS SUCH, ANY DECISION BY THIS COURT WOULD AT BEST BE ADVISORY.

Home Depot does not dispute that the removal statutes vest the right of removal exclusively in a "defendant" who has been sued by a plaintiff in a civil action brought in state court. Instead, the consistent thrust of Home Depot's argument is that it should also be regarded as a "defendant" and, therefore, enjoy all of the removal rights accorded to the defendants sued by the plaintiff. Thus, under Home Depot's proposed formulation there would actually be three defendants in this action that could

seek removal rights under the removal statutes: Mr. Jackson, an individual residing in North Carolina and the defendant sued by the plaintiff; Home Depot, a Georgia-based, publicly traded company and third-party counterclaim defendant, Pet. for a Writ of Certiorari at ii;[2] and Carolina Water Systems, Inc. ("CWS"), a North Carolina-based third-party counterclaim defendant, Respondent's Brief ("RB") 58 (citing Dist. Ct. Dkt. No. 24, at 16-17).[3] Yet, even if Home Depot is correct, Home Depot would still not be entitled to remove this action.

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[2] *See also* Corporate Office Headquarters, *The Home Depot, Inc.*, http://www.corporate-office-headquarters.com/the-home-depot-inc (last visited December 13, 2018).

[3] Publicly available information describes CWS as follows: "Business Description Carolina Water Systems, which also operates under the name Rainsoft Water Treatment, is located in Charlotte, North Carolina. This organization primarily operates in the Water Purification Equipment business / industry within the Miscellaneous Retail sector. This organization has been operating for approximately 21 years. Carolina Water Systems is estimated to generate $4.2 million in annual revenues, and employs approximately 29 people at this single location." Buzzfile, Carolina Water Systems Inc. Business Description, http://www.buzzfile.com/business/Rainsoft-Water-Treatment-704-921-1950 (last visited December 13, 2018).

A. Home Depot, Even as a "Defendant," Would Not Have Been Entitled to Remove this Action Under the Law as it Existed Before the Enactment of CAFA.

Before CAFA was enacted, the only avenue for removal of this action by Home Depot would have been under the diversity provisions of 28 U.S.C. § 1332(d). However, such removal would not have been possible, because when § 1441(a) provides the sole basis for removal, "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). Indisputably, Mr. Jackson, who has been properly joined and served, has not consented to removal. Therefore, even if this Court construed Home Depot to have been a defendant pursuant to § 1441(a), Home Depot could not remove this action to federal court. The plain text of the removal statutes requires Mr. Jackson's consent and Home Depot has never had that.

While there can be no question that Mr. Jackson is a defendant as defined by § 1441(a), even if Mr. Jackson were somehow considered a "plaintiff,"[4] Home Depot still could not remove based

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[4] This Court has already determined that Mr. Jackson, having not initiated the original proceeding, may not be considered a "plaintiff." Even in the more liberal context of CAFA, in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169-170 (2014) this Court held that when Congress used the

upon the traditional diversity statutes. An action "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought," § 1441(b)(2), and Defendant CWS is a citizen of North Carolina. Further, pursuant to § 1332(a), no diversity jurisdiction exists over cases in which any plaintiff is a citizen of the same state as any defendant, and here both Mr. Jackson and CWS are North Carolina citizens.

B. Even if Home Depot is Considered To Be a "Defendant," CAFA Would Still Not Provide Home Depot With an Alternate Basis for Successful Removal.

Post-CAFA § 1332(d)(4) specifically exempts local controversies, such as this, from federal court jurisdiction. Section 1332(d)(4) provides that that there is no federal court jurisdiction under CAFA when four criteria are met: (1) "greater than two-thirds of the members of all proposed plaintiff classes . . . are citizens of the State in which the action was originally filed"; (2) "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims" is "a citizen of the State in which the action was originally filed"; (3) "principal injuries resulting from the alleged conduct or any related

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word "plaintiffs," it intended the term to have its ordinary meaning as used in the Federal Rules of Civil Procedure.

conduct of each defendant were incurred in the State in which the action was originally filed"; and (4) "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." § 1332(d)(4).

Before the courts below, Mr. Jackson properly raised the local controversy exception. RB 57-59. The facts as summarized below lead inexorably to the conclusion that there is no federal court jurisdiction even if Home Depot is considered a "defendant" for purposes of its ability to remove this action under the CAFA amendments.

The class at issue includes all people who purchased water-treatment systems from Home Depot and CWS, with class members residing almost entirely within the state of North Carolina. Joint Appendix ("JA") 62. Home Depot's own records show that out of 286 purchasers, 259 have North Carolina addresses. Dist. Ct. Dkt. No. 42-1, at 5-15. Thus, approximately ninety percent of the proposed class—greater than the two-thirds required—are citizens of North Carolina. *Id.* Third-party counterclaim defendant CWS is a citizen of North Carolina, meaning that "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims" is an in-state defendant. The class definition shows that the principal injuries of the alleged North Carolina water-treatment scheme occurred in

North Carolina. Dist. Ct. Dkt. No. 24, at 18-19. Finally, the record reveals that no other class action asserting similar factual allegations against Home Depot or CWS was filed in the three years preceding Mr. Jackson's counterclaims. *Id.* at 19. Given this, CAFA does not provide federal court jurisdiction to Home Depot even if it is considered to be a "defendant" trying to remove.

C. Ultimately It Will Be Proven That this Court Does Not Have Jurisdiction to Hear this Case and Any Opinion Will Accordingly Be Merely Advisory.

This Court made clear in *Grupo Dataflux v. Atlas Global Grp., L.P.* that by "whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements." 541 U.S. 567, 593 (2004) (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which states that "every federal appellate court has a 'special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it" (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

Here, the bottom line is that despite the questions accepted for review by this Court, as has been shown above, federal courts do not have the underlying jurisdiction to hear this case. When a lower district court lacks jurisdiction, this Court's

only jurisdiction on appeal is "not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick et al.*, 298 U.S. 435, 440 (1936) (footnotes omitted). *See also Foster v. Chatman*, 136 S.Ct. 1737, 1763 (2016) (Thomas, J., dissenting) (warning that proceeding further without establishing the Court's jurisdiction will lead to "an impermissible advisory opinion."). Such an impermissible advisory opinion would be the ultimate fate of any decision this Court renders here. Simply put, Congress did not confer jurisdiction on Article III federal courts to render advisory opinions. *See Muskrat v. United States*, 219 U.S. 346, 354-56 (1911).

II. CONTRARY TO THE PROTESTATIONS OF HOME DEPOT AND ITS AMICI, ALL PUBLIC POLICY ARGUMENTS WEIGH IN FAVOR OF THIS CASE PROCEEDING IN NORTH CAROLINA STATE COURT.

A. Home Depot and Its Amici Recite Rote Descriptions About Class Actions Absent Case or Documentary Support, Ignoring That this is the Prototypical Class Action That Congress, When Enacting CAFA, Intended Would Remain in State Court.

Home Depot's amici resuscitate a time-worn parade of supposed horrible conduct perpetrated by class counsel and the class actions they bring. Many of their citations and references regarding the

problematic nature of class actions come from The Class Action Fairness Act of 2005, S. Rep. No. 109-14 (2005) ("Senate Report"). *See* Chamber 18-19, Brief of Washington Legal Foundation and Allied Educational Foundation ("WLF") 30, DRI 5, 9-10. These descriptions by their very nature are at best descriptive of a pre-CAFA world. However, in this post-CAFA world, Chamber goes to great lengths to explain that CAFA was a huge success and has worked quite well. Chamber 3, 5, 13, 20.[5]

It is to the detriment of this ostensibly massively-improved post-CAFA federal court world that Home Depot and its amici argue plaintiffs have discovered a "giant loophole" which could bring down the efficient CAFA edifice. Petitioner's Brief ("PB") 42. The result would do serious harm to CAFA's overriding purpose – the critical need for federal jurisdiction of interstate cases of national importance. *See, e.g.*, Chamber 20, DRI 7, WLF 13.

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[5] But for a contrary view, see Wiley E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts -- A Historical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 Wm. & Mary Bus. L. Rev. 419, 559-60, 568 (April 2012) ("[t]he research and empirical findings in this Article strongly suggest: (1) CAFA's highly questionable removal and jurisdictional rules evolved from untruths or just plain fabrications, and (2) the new rules undermine the principles of judicial federalism."). In this extensive study, Professor Rice analyzed and coded 2,657 federal and state court class actions and ordinary decisions.

Yet, neither Home Depot nor its amici ever make even a passing attempt to relate the actual facts at issue before this Court to their doom and gloom scenario. The reason is obvious. This case is not what has been defined as an interstate case nor can it conceivably be considered a case of national rather than North Carolina importance. The alleged fraudulent scheme in question was perpetrated within the state of North Carolina to almost entirely North Carolina residents and has been brought pursuant to North Carolina law, including allegations of violation of the rather unique North Carolina Referral Sales Statute (N.C. Gen. Stat. § 25A-37.). The defendant that Home Depot was allegedly in cahoots with is based in North Carolina. And from purely a public policy perspective, even Home Depot can hardly be considered the type of disadvantaged "out of state" resident the framers sought to protect. *See* PB 25, WLF 23. Home Depot has 39 locations within the state of North Carolina.[6]

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[6] On its website, Home Depot lists the following North Carolina locations: Apex; Asheville; Battleground; Burlington; Cary; Cornelius; Durham; E. Charlotte; E. Greensboro; Fayetteville; Fuquay Varina; Garner; Gastonia; Greensboro; Hendersonville; Hickory; High Point; Hillsborough; Jacksonville; Kannapolis; Kitty Hawk; Knightdale; Matthews; Myrtle Grove; North Durham; Northwest Raleigh; Pineville; S. Boulevard Charlotte; Shallotte; South Charlotte; Statesville; Steele Creek; University; W. Asheville; Wake Forest; Wendover; Wilmington; and Winston Salem (2). *See* The Home Depot, *Store Finder*, https://www.homedepot.com/l/search/north%20carolina/full/?lat=35.760336605333244&lng=79.22108101843261&radius=100 (last visited December 13, 2018).

Instead, this case is a prototype of the type of case Congress concluded should remain in state court even after CAFA was enacted. At page 41 of the Senate Report, an example of a class action brought against a Florida funeral home is described as one that "would remain in state court" even after CAFA. In the example, just as here, "about 90 percent" of the class members are residents of the state where the action is brought. Similar to the third-party crossclaim defendants here, the example describes one in-state resident defendant along with an out-of-state defendant. And just as here, no other class action has been filed regarding the issues of concern. As a result, the Senate Report concludes: "This is precisely the type of case for which the Local Controversy Exception was developed . . . the controversy is at its core a local one, and the Florida state court where it was brought has a strong interest in resolving the dispute." *Id.*

B. In Contrast to the Protestations of Amici Chamber, When Congress Passed CAFA, It Expressly Did Not Show a Desire to Enhance the Coverage of MDL Jurisdiction.

In 1968, Congress created the multidistrict litigation device and, to administer it, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). *See* 28 U.S.C. § 1407. Amici Chamber argue without explanation that the failure of this case to proceed in federal court will somehow undermine the entire MDL system. Chamber 8-11.

How this would happen is unclear. There is no MDL referenced that the within action might be a part of nor is there an explanation as to how a consumer fraud action for North Carolina residents against a North Carolina company for conduct committed almost entirely in North Carolina would become part of an MDL. Moreover, there is certainly no attempt to demonstrate that a federal court would handle this matter more efficiently than a North Carolina state court, particularly when most of the issues are peculiar to North Carolina law.

Furthermore, the actual text of 28 U.S.C. § 1407 demonstrates that Congress did not view the MDL procedure as a panacea for all similar claims as those claims removed pursuant to CAFA. In fact, subsections § 1332(d)(11)(C) and (D), enacted as a part of CAFA, state that when a mass action is removed to a federal court under CAFA's new provisions, it **may not** be transferred to another federal court under the MDL statute (§ 1407) unless a majority of the plaintiffs request such a transfer. This is hardly the ringing endorsement of the MDL process proffered in Chamber's brief, but rather a Congressional expression of keeping local matters local.

C. The State Courts Are Necessary Courts of General Jurisdiction and the Much Smaller Federal Court System Is Limited in Its Jurisdiction.

Home Depot and its amici spend much time denigrating the state court system. PB 43-45, Chamber 16-17, DRI 7-15, 19-21. They ignore the fact that from the founding of our Republic, the expectation has been that the state courts would be the primary forum for the protection of rights and interests of citizens and that the power of the federal courts and Congress itself would be carefully confined or limited. Indeed, from 1789 through to the present, the 10th Amendment has made it explicit that the states are to play a vital role in protecting the interests of citizens. "[The] Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting).

As a result, this Court has long recognized the hazard of undue assertion of federal power. "[T]he scope of this [federal] power must be considered in the light of our dual system of government, and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 37 (1937).

This deference is necessary not only constitutionally but administratively. The vast majority of litigation in the United States takes place in state courts. As of 2012, there were 94 federal district courts as against approximately 2,177 state trial courts of general jurisdiction with approximately 10,387 state judges trying cases. *See Rice, supra footnote 5*, at 559-60.

State court cases touch on every aspect of modern life and every imaginable type of dispute, including many that have their origin in federal law. Indeed, the development of tort law and its guiding principles are indebted to legal issues first resolved by state courts. Just one example is the seminal decision by Justice Benjamin Cardozo in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). Tort law students are trained in the decisions of California Justices Malcolm Lucas and Roger Traynor.

"History and precedent affirm the virtue of state courts to protect citizens, evolve new standards, and achieve just and fair resolution of claims." Andrew F. Popper, *On The Necessity of Preserving Access to State Courts and Civil Justice: Rediscovering Federalism & Debunking "Fraudulent" Joinder*, 44 Rutgers L. Rec. 160, 170 (2017) (citing Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (2012), which states "Margaret Marshall, the recently retired chief justice of the Massachusetts Supreme Judicial Court said "From

the people's point of view, justice in America is delivered first and foremost through the state courts[.]")). Home Depot and its amici's general denigration of the state court system is, to say the least, unfortunate.

D. Amicus DRI Is Categorically Wrong in Its Characterization of State Judges as Being Biased Due to Their Elections Being Dominated by Contributions from the Plaintiffs' Bar.

Without any evidentiary support, DRI claims state court bias due to the fact that "state-court trial judges' electoral campaigns routinely receive substantial financial support from the plaintiffs' bar." DRI 7. However, the empirical evidence shows the exact opposite. For instance, during 2011 and 2012, the Ohio Republican Party was the highest donor nationally, followed by large defense firms, many of which are presumably members of DRI. *See* Followthemoney.org, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, https://www.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012#item_1.

In fact, a 2013 study shows that business interests, not plaintiff lawyers, dominate judicial election financing and that the votes of justices are influenced by these contributions. *See* Joanna Shepherd, *Justice At Risk – An Empirical Analysis*

Of Campaign Contributions And Judicial Decisions, American Constitution Society for Law and Policy (June 2013), *available at* https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/JusticeAtRisk_Nov2013.pdf.

More recently, a report by The Brennan Center noted that "[o]ne of the most striking aspects of the 2015-16 cycle was the sharp rise in outside spending — most of it non-transparent — by political action committees, 'social welfare organizations' incorporated under 501(c)(4) of the Internal Revenue Code, and other non-party groups, mirroring the trends in regular political races, both state and federal." Alicia Bannon *et al.*, *Who Pays for Judicial Races?*, 7 (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf.

Thus, DRI's naked suggestion that state courts are impermissibly biased because they "receive substantial financial support from the plaintiffs' bar" should be flatly rejected as entirely without support. While state courts certainly have a strong interest in providing a forum for their citizens, this does not suggest a bias or lack of fairness. Rather, it suggests the proper role of state courts, which has been repeatedly acknowledged by this Court. *See San Remo Hotel, L.P. v. City and Cnty. of S.F.*, 545 U.S. 323, 347 (2005); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 449 (2001); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975).

III. ITS TEXT AND HISTORY MAKE IT CLEAR THAT CONGRESS NEVER MEANT TO INCLUDE "THIRD-PARTY COUNTERCLAIM DEFENDANTS" WHEN IT GRANTED REMOVAL RIGHTS TO "DEFENDANTS."

A. Congress Intended to Grant Removal Rights Only to Traditional Defendants.

In 1875, Congress "greatly liberalized" removal practice by allowing "either party" to remove a case to federal court. *See* Judiciary Act of 1875, ch. 137, 18 Stat. 470, 471 (1875) (permitting removal in a case "wholly between citizens of different States, and which can be fully determined as between them," by "either one or more of the plaintiffs or defendants actually interested in such controversy"). Within twelve years, Congress recoiled from the vast expansion of the federal docket and replaced the "either party" language of the 1875 Act with "the defendant or defendants therein" language that eventually made its way into the 28 U.S.C. § 71 (1940) that was considered by this Court in the seminal case of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887).

In 1911, with some alterations in language, this statute became § 28 of the Judicial Code (Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1094-1095 (1911) (codified at 28 U.S.C. § 71 (1940)), and in 1948, with additional alterations, it migrated to § 1441 (Act of

June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 937-938 (1949)). Today, § 1441(a) governs removal in the absence of another, more specific removal provision.

In *Shamrock Oil*, this Court unequivocally held that in interpreting the removal statute, the phrase "the defendants or defendants therein" means what it says and provides only that the defendant(s) sued by the plaintiff(s) in a case have the right to remove. 313 U.S. at 104-109. This Court's reasoning focused on the history and language of the various iterations of the removal statute. *Id.* at 105-108. In particular, the first removal statute, § 12 of the Judiciary Act of 1789, allowed only "the defendant" to remove a case. *See* Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845); *see also Shamrock Oil*, 313 U.S. at 105-106. This Court further found that the specificity of the word "defendant" standing alone is clear, which to this day has not changed and should govern this Court's answer to the question presented regarding *Shamrock Oil*: *Shamrock Oil's* removal bar does "extend to third-party counterclaim defendants," because they have never been considered to be "defendants" to an action brought by a plaintiff as that word was used at the time the language in question was first drafted through to today.

This Court has long mandated that jurisdictional statutes, particularly removal statutes, must be textually limited. *See Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 558 (2005) (stating that "[w]e must not give

jurisdictional statutes a more expansive interpretation than their text warrants."); *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The starting point of any textual analysis of a statute is the plain language of the statute and here that language only uses the word "defendant" rather than the word "defendant" with some preceding descriptive language, such as "third-party," "cross-," or "third-party counterclaim." "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113 (1850). Here, the word "defendant," standing on its own, has long commonly meant a party sued by a plaintiff.

This is because textually a "third-party defendant" is "[a] party brought into a lawsuit by the original defendant." Black's Law Dictionary (10th ed. 2014) (emphasis added). Here, of course, Home Depot is one of the third-party counterclaim defendants brought into the action in state court by Mr. Jackson and would never commonly be referred to as the "defendant." Home Depot's reliance on an idiosyncratic revamping of the meaning of the word "defendant" is unavailing against the more specific generally used term "third-party defendant" that in common parlance describes its status. *See, e.g.*, Fed.

R. Civ. Pro. 14 (Third Party Practice) (which would be rendered meaningless if Rule 14 was made applicable to all or "any defendants"). Moreover, Home Depot and its amici "supply no persuasive proof that Congress sought to invoke their idiosyncratic definition" of the word "defendant" when enacting the removal statutes. *See Wisconsin Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2072-73 (2018) ("while the term 'money' *sometimes* might be used in this much more expansive sense, that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today).").

Moreover, this Court in *Shamrock Oil* bolstered its interpretation of § 71 with a policy argument: the desirability of "strict construction" of "acts of Congress regulating the jurisdiction of the federal courts." 313 U.S. at 108. "Due regard for the rightful independence of state governments," this Court noted, requires the federal courts to "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (internal quotation marks omitted)). It did not and could not have meant to expand that jurisdiction by allowing third-party counterclaim defendants removal rights. For more than 200 years, with only a short break, removal textually has been limited to those "defendants" sued by the plaintiff. Defendant, as a term standing alone, means the party sued by the plaintiff. This is consistent with this Court's recent guidance that "[i]f the statutory language is plain,

the Court must enforce it according to its terms." *King v. Burwell*, 135 S.Ct. 2480, 2483 (2015).

B. This Court's Long-Established Tradition to Strictly Construe Removal Under § 1441 Was Not Changed By CAFA and § 1453 in Order to Extend Removal Rights to Third-Party Counterclaim Defendants.

This Court's long-established tradition to narrowly construe removal under § 1441 as expressed in *Shamrock Oil* should be followed unless it was specifically prohibited by the clear meaning of the textual provisions of § 1453. It was not.

With the passage of CAFA, Congress expressed its intention to expand removal in discrete ways by amending various sections of 28 U.S.C. §§ 1332, 1446, and 1447. Importantly, CAFA did not completely rewrite or replace the removal statute § 1441 in its entirety. Rather, removal under CAFA, codified as § 1453, is an entirely separate procedural statute that adds discrete, specific, changes, none of which changed or altered § 1441 removal in a way that would permit a third-party counterclaim defendant to remove an action to federal court. Indeed, a careful, textual, examination of § 1453 reveals that it clearly does not confer removal authority to third-party counterclaim defendants.

Here, the last clause of § 1453(b) provides that certain actions "may be removed by any defendant

without the consent of all defendants." Home Depot has glommed onto the word "any" in order to provide a reading to this phrase that is not described in the Senate History nor any other similar statute. Clearly, when read in its context, the use of the word "any" only alters this Court's rule requiring the unanimous consent of all defendants in cases not subject to CAFA.[7] *See, e.g., Chi., Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247-48 (1900) (stating that because the removal statute "is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition"). CAFA does not, as Home Depot and its amici argue, expand the removal statute, § 1441, to include removal rights for third-party counterclaim defendants.

This Court's canon is to follow ordinary usage of a term, such as "defendant," unless Congress specifically provides a specified or technical meaning. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Here, Congress did not provide a specified or technical meaning to the word "defendant" when it is used in the phrase "any defendant." Thus, regardless of the use of the adjective "any," there is absolutely no reason to

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[7] Notably, the unanimous consent requirement of § 1446(b)(2)(A) has not been extended to third-party counterclaim defendants when a defendant has sought removal pursuant to § 1441(a).

believe that Congress meant to change the meaning of the word "defendant." Certainly, Congress cannot reasonably be believed to have meant that the use of the word "defendant" in "any defendant" would mean something different from the same word "defendant" it had been using in the phrase "a defendant or defendants" for more than 100 years – nor that such a novel definition of the word "defendant" would be readily apparent to those reading the new statute.

If Congress had desired to alter the understanding of such an enduring term as "defendant" to suddenly include "third-party counterclaim defendants," it would not have done so subtly and silently. To the contrary, it can be presumed that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991). This is described as the "dog didn't bark" canon, which is particularly relevant here, because Congress never even mentioned, much less discussed, providing removal rights to a third-party counterclaim defendant, such as Home Depot, or enlarging the ambit of the word "defendant" to include third-party counterclaim defendants.

Under both §§ 1441(a) and 1453(b), the text of these statutes simply does not permit a third-party counterclaim defendant to remove a case to federal court. Congress is presumed to know the legal landscape against which it legislates. Applying the

long-standing, well-established rules and canons of statutory interpretation, if Congress wants to overturn a precedent, it can do so expressly. As to third-party counterclaim defendants, such as Home Depot, Congress was meaningfully silent. There can only be one conclusion. The plain text of §§ 1441 and 1453 do not permit a third-party counterclaim defendant to remove a case to federal court. This should end the inquiry.

Finally, while this Court in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547, 554-55 (2014) has interpreted CAFA, and in particular, § 1453, to be read broadly, that does not mean § 1441 should now be read beyond the words Congress chose to include in the statute. When there is nothing in the text of CAFA or in the Congressional record that even suggests that Congress intended § 1441 to be read broadly, there is no textual or historical basis to change this Court's *Shamrock Oil* decision and now read § 1441 in favor of removal by a separately described entity, a third-party counterclaim defendant. Moreover, as is discussed below, to do so would be to broadly expand federal jurisdiction, which the Constitution, Congress, and this Court have consistently limited.

C. Home Depot Cannot Use Congress' Silence on Its Idiosyncratic Interpretation of "Defendant" To Support That Unique Interpretation.

In order to support its idiosyncratic reinterpretation of the word "defendant, Home Depot and its amici (WLF 21-22) seek to persuade this Court to assume a lack of Congressional awareness of judicial precedents on existing statutory schemes. But *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) clearly stands for the proposition that Congress is presumed to know the existing laws and their interpretation when it drafts new legislation. *See also Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995); *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362 n.3 (2006). Additionally, this Court has held that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute. [Citation.]." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018).

There can be little question that long before CAFA was adopted the word "defendant" was consistently interpreted to mean only the party sued by the plaintiff(s) and not "third-party counterclaim defendants." Where there is a "settled judicial construction," this Court has applied the "presumption that Congress was aware of these earlier judicial interpretations and, in effect,

adopted them." *Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Even the authority cited at WLF 21-22, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, states, "[w]hen Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." 511 U.S. 164, 185 (1994).

WLF's separate reliance on *Alexander v. Sandoval* is misplaced, as it is in conflict with Home Depot's statement throughout its briefing of the extensive and lengthy study Congress undertook in adopting CAFA. *See* PB *passim*; *see also* Chamber 14. It certainly is not true about CAFA that "Congress [did] not comprehensively revis[e] a statutory scheme but has made only isolated amendments" that would call into question its approval of the court's interpretations. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). As is discussed by amici Chamber, CAFA resulted from a "grinding eight-year effort" and "required an exceedingly rare level of persistence and, ultimately, bipartisan cooperation." Chamber 14. Under these circumstances, it is ludicrous to think that Congress was not aware of prior precedents when CAFA was enacted.

IV. IF THIS COURT CONCLUDES THAT "THIRD-PARTY COUNTERCLAIM DEFENDANTS" MAY REMOVE ACTIONS TO FEDERAL COURT, INSTEAD OF LIMITING GAMESMANSHIP, IT WILL USHER IN A NEW ERA OF A VASTLY ENLARGED FEDERAL DOCKET.

A. Home Depot's Concerns Are Grossly Overblown; There Have Been Relatively Few Third-party Counterclaim Class Actions in the Thirteen Years Since CAFA Became Law.

Home Depot argues that upholding the Fourth Circuit's reading of CAFA as consistent with all prior removal statutes would somehow result in a dystopian world of class-action litigation where plaintiffs' attorneys would devote their time to combing over dockets for "a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action." PB 43.

Then, without evidentiary support of any pattern or practice on the part of the Plaintiffs' bar, Home Depot alleges that the uniform decisions of the Fourth, Sixth, Seventh, and Ninth Circuits "provide a roadmap for circumventing" what it asserts is the clear purpose of CAFA to "combat the observed biases against out-of-state defendants." *Id.*

In support of its position, Home Depot cites to articles fretting about a perceived risk without identifying any actual tsunami of state court class actions resulting from the appellate cases they point to as allegedly opening up the floodgates.[8] The reality is that there have been remarkably few cases that have needed to address this issue, much less enough to necessitate asking this Court to wade into an area where there is no split of authority among the Circuits and the appellate court decisions are remarkably consistent. The paucity of cases falling into the category of third-party counterclaim class actions over the thirteen years since CAFA was enacted is striking. All of two circuit courts ruled on this issue prior to this Court's decision in *Dart Cherokee*. *See Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014, 1017 (9th Cir. 2007); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332-33 (4th Cir. 2008).[9] And just two more circuit courts have

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[8] For instance, Home Depot cites as authority a "legal opinion letter" from Dan Himmelfarb disparaging the Fourth Circuit's holding in *Palisades* without disclosing that Mr. Himmelfarb represented the appellants in that case. PB 42-43. His views, far from being scholarly insight, were an extension of his advocacy in that case. Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2.

[9] Home Depot's position at PB 10 that *Dart Cherokee* somehow overruled *Palisades* and its progeny by holding that there is no "antiremoval presumption" under CAFA is incorrect because it misstates the basis for the Fourth Circuit's decision. *Dart Cherokee*, 135 S. Ct. at 554. *Palisades* certainly recognized that

ruled after this Court's decision in *Dart Cherokee*, with both rulings being consistent with the first two circuits. *See Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 356 (7th Cir. 2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 854 (6th Cir. 2012) ("*MERS*"); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 916-17 (7th Cir. 2010). Equally remarkable is the extremely small number of counterclaim class actions Home Depot and its amici have been able to cite to which have not generated circuit court decisions. *See* PB 39, Chamber 13, PLC 8, and DRI 18.

Absent evidentiary support or any pattern of abuse, Home Depot's floodgate fears are nothing more than a lament that it is "stuck litigating a large class action in a state court of someone else's choosing" — as if its business decision to partner in a predatory scheme to defraud North Carolina consumers was not a choice. PB 45.

There is simply nothing in the cases Home Depot and its amici point to as creating a roadmap to defeat CAFA actually operating that way. Instead, there is remarkable consistency among the circuits in the way CAFA was intended to apply.

"Congress clearly wished to expand federal jurisdiction through CAFA." *Palisades*, 552 F3d. at 336.

B. If This Court Rules As Home Depot Wishes, the Much Greater Risk Will Be That Some Defendants Will Attempt to Game the System In Order to Gain Their Preferred Jurisdiction.

On the facts of this case, Home Depot is arguing that when the word "defendant" is used in the removal statutes, it must be read to mean that third-party counterclaim defendants are among those permitted to remove a case to federal court. If this Court agrees, instead of closing what Home Depot and its amici describe as a "loophole," it is much more likely that the door will be left wide open for defendants to game the system and remove state-based cases of all types to federal court.

Well before CAFA was enacted, defendants attempted this gamesmanship. In *Dauenhauer v. Superior Court*, after plaintiff filed his complaint, a defendant filed a cross-complaint against Utah Home Fire Insurance Company. 149 Cal.App.2d 22, 24 (3rd Dist. 1957). Utah Home Fire Insurance Company, joined as an out-of-state cross-defendant, removed the case. *Id.* It was subsequently and correctly remanded. *Id.* However, if such a third-party counterclaim removal is now sanctioned, any in-state tort defendant could implead its out-of-state insurance company to gain a federal venue.

The reality is that there would be no shortage of cases involving out-of-state third-party

counterclaim defendants that could provide in-state defendants with a means to escape from state courts they do not like. *See, e.g., United Founders Life Ins. Co. of Ill. v. Blackhawk Holding Corp.*, 341 F. Supp. 483 (E.D. Wis. 1972) (finding in the absence of diversity of citizenship between a plaintiff and one or more defendants, crossclaim involving defendants among whom there was diversity cannot provide a basis for removal); *Verschell v. Fireman's Fund Ins. Co.*, 257 F. Supp. 153 (S.D.N.Y. 1966) (holding that fire insurer was not entitled to remove to federal court action against it that was brought by insured's assignee); *Morris v. Marshall Cty. Bd. of Educ.*, 560 F. Supp. 43 (N.D.W. Va. 1983).

While it is now rather settled law that third-party counterclaim defendants cannot initiate removal proceedings, other early cases in which such removal was attempted highlight the ability defendants would have if this Court accepts Home Depot's argument. Gaming of the system could occur particularly in product liability cases. In *Share v. Sears, Roebuck & Co.*, 550 F. Supp. 1107 (E.D. Pa. 1982), the plaintiff brought suit against Sears for injuries he received operating a lawn mower purchased at the department store. Sears, in turn, filed a third-party complaint against the lawn mower manufacturer, seeking indemnification for any damages. The manufacturer removed the case on the basis of diversity. The court found that a third-party defendant is not a "defendant" within the meaning of the removal statute and, therefore, the manufacturer did not have standing to remove

the case. *Id.* at 1108-09. Similarly, in *Hyde v. Carder*, 310 F. Supp. 1340 (W.D. Ky. 1970), the defendant beverage distributor filed a third-party action for indemnification after it was sued for damages when the plaintiff was injured by an exploding bottle. Other similar liability cases would readily end up removed to federal court. *See, e.g., Holloway v. Gamble-Skogmo, Inc.*, 274 F. Supp. 321, 323-24 (N.D. Ill. 1967) (involving a defective tire); *White v. Baltic Conveyor Co.*, 209 F. Supp. 716 (D.N.J. 1962) (involving defective installation of a conveyor belt); *Marshall v. Navco, Inc.*, 152 F. Supp. 50, 54 (S.D. Tex. 1957) (involving worker injuries); *Schoneweather v. L. F. Richardson, Inc.*, 122 F. Supp. 692, 693 (W.D. Mo. 1954) (involving injuries from the negligent installation of a heating unit).

Such potential for removal would extend to cases outside of the tort realm. A lawsuit against a car dealer for rescission and damages would have been removed after the dealer filed a third-party complaint against the manufacturer. *See, e.g., Tuyagda Aluminum Prods. Corp. v. Hull Dobbs 65th Infantry Ford, Inc.*, 313 F. Supp. 774 (D.P.R 1970). Allowing defendants to game the system for even the most basic of contract disputes would overrun the federal courts.

One case shows the absurd results that Home Depot's interpretation could bring about. In *Croy v. Buckeye Int'l, Inc.*, 483 F. Supp. 402 (D. Md. 1979), it was a fourth-party defendant that sought removal. The court held that a fourth-party defendant is not

a "defendant" under the removal statute. Conceivably, if this well-crafted limitation is lifted from third-party counterclaim defendants, every hyphenated defendant down the chain, no matter how removed from the original claim, could remove the action. Federal courts would be overwhelmed.

C. History Shows That Certain Defendants Have Used Such Loopholes to Gain Their Preferred Federal Jurisdiction.

In fact, a number of defendants have already been gaming removal jurisdiction through the artifice of checking filings and removing cases before they have been "properly joined and served," thereby gaming the language of § 1441(b)(2). *See Phillips Constr., LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544, 554 n.2 (S.D.W. Va. 2015). *See also Harvey v. Shelter Ins. Co*, Civ. A. No. 13-392, 2013 WL 1768658, *2 (E.D. La. Apr. 24, 2013). ("[T]he plain language of the statute must prevail over the plaintiff's policy arguments to the contrary. The statutory forum defendant rule simply does not support plaintiff's position."); *City of Ann Arbor Emps. Ret. Sys. v. Gecht*, No. C-06-7453 EMC, 2007 WL 760568, *8-10 (N.D. Cal. Mar. 9, 2007) (holding that the court was "constrained by the plain language of § 1441(b)" but also stating that plaintiff's argument that the resident defendant engaged in gamesmanship "is not without merit-indeed, has a great deal of appeal"); *Poznanovich v. AstraZeneca Pharm. LP*, Civ. A. No. 11-4001 (JAP),

2011 WL 6180026, *3 (D.N.J. Dec. 12, 2011) (courts following the plain meaning approach "acknowledge in some way 'the colorable policy arguments that it is unjust that a properly joined defendant could monitor state court dockets and remove cases prior to being served, and that it makes little sense to provide a federal forum to an in-state defendant upon removal of a diversity case,' [but] these decisions found such arguments to be insufficient to overcome the requirement that a court give meaning to the plain language of the statute.").

No doubt, "Congress could not possibly have anticipated the tremendous loophole that would one day manifest from technology enabling forum defendants to circumvent the forum defendant rule by, *inter alia*, electronically monitoring state court dockets." *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008). Yet, this loophole would be *de minimus* when compared to the floodgates that would open up if third-party counterclaim defendants receive removal rights.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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